Filed 12/5/13 In re N.C. CA1/5

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**In re N.C., a Person Coming Under the Juvenile Court Law.**

**SONOMA COUNTY HUMAN SERVICES DEPARTMENT,**

**Plaintiff and Respondent,**

**N.M. et al.,**

**Defendants and Appellants.**

_____/

**A136990**

**(Sonoma County Super. Ct. No. 3682DEP)**

The juvenile court terminated N.M. (mother) and presumed father John C.'s (father) parental rights as to N.C. (daughter) after a Welfare and Institutions Code section 366.26 permanency hearing (.26 hearing).[1] Mother and father appeal. Mother contends: (1) the notices sent pursuant to the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq. (ICWA)) were deficient; (2) the court erred by denying her *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) motion; and (3) the court erred by declining to apply the beneficial parent-child relationship exception to termination of parental rights (§ 366.26, subd. (c)(1)(B)(i)). Father also appeals, claiming the ICWA notices were deficient and

[1] Unless otherwise noted, all further statutory references are to the Welfare and Institutions Code.

the Sonoma County Human Services Department (Department) failed to inquire about his "possible Indian ancestry."[2]

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

*Detention, Jurisdiction, and Disposition*

In a July 2011 petition, the Department alleged 10-month-old daughter came within section 300, subdivision (b) because mother and father had domestic violence issues and because father used controlled substances and had a criminal history. The juvenile court detained daughter and ordered the Department to provide ICWA notice because mother reported Cherokee and Choctaw heritage. The Department sent Judicial Council form ICWA-030 (Notice of Child Custody Proceeding for Indian Child) to the Bureau of Indian Affairs (BIA) and to the relevant Cherokee and Choctaw tribes.

After a contested jurisdictional and dispositional hearing, the court declared daughter a dependent of the court, removed her from parental custody, and ordered reunification services for both parents.

*Six-Month Review Hearing and Section 388 Petitions*

In its report for the sixth-month review hearing, the Department recommended terminating reunification services. The court denied the paternal grandparents' section 388 petition requesting, among other things, that the court place daughter in their home and grant them de facto parent status. The court granted the Department's section 388 petition requesting termination of father's visits with daughter, concluding the visits were

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[2] Mother and father join each other's briefs. (Cal. Rules of Court, rule 8.200(a)(5).) In related case No. A136480, father claimed the court erred by granting the Department's section 388 petition and terminating his visitation pending the .26 hearing. We rejected this claim in an unpublished opinion. (*In re N.C.* (Oct. 11, 2013, A136480) [nonpub. opn.].) In this appeal, father "incorporates his arguments and discussion" regarding his appeal in case No. A136480. We decline father's invitation to revisit the issues in his prior appeal.

By separate order filed this date, we deny mother's related petition for writ of habeas corpus (A139334) raising an ineffective assistance of counsel claim.

detrimental. Following the six-month review hearing, the court terminated reunification services and set a .26 hearing. The court also determined ICWA did not apply.

*The .26 and Marsden Hearings*

In its .26 hearing report, the Department recommended terminating parental rights and ordering a permanent adoption plan. The Department noted daughter had been in a prospective adoptive home since December 2011, and that she was forming "a secure attachment to her prospective adoptive parents who are committed to raising her as their own daughter and providing for optimal development." Daughter's prospective adoptive mother described her as an "outgoing loving child who interacts effortlessly with the prospective adoptive family."

According to the Department, daughter's twice monthly supervised visits with mother were "stressful and problematic." Although mother "respect[ed] the needs of her child by allowing [daughter] to direct activities" during their supervised visits, daughter clung to her prospective adoptive mother during at least one visit and regularly went "to her prospective adoptive mother immediately" at the end of the visits. The Department noted there had "been no visits" between daughter and father.

The adoption report prepared by the California Department of Social Services (State Adoptions) also recommended terminating parental rights and ordering a plan of adoption. Among other things, the report noted daughter had nightmares and tantrums after visits with mother. State Adoptions concluded that although the interaction between mother and daughter "may have some incidental benefit, such benefit does not outweigh the benefit [daughter] will gain through the permanence of adoption. [State Adoptions] finds that termination of parental rights would not be detrimental to the child."

In the 15 months before the .26 hearing, attorney Bonnie Alonso (trial counsel or counsel) represented mother. On the first day of the .26 hearing in October 2012, attorney Jennifer Ani appeared with a substitution of counsel form and told the court mother had retained her. She requested a continuance to "come up to speed" on the case. The court declined to continue the .26 hearing. Shortly thereafter, Ms. Ani refused to take mother's case file from trial counsel and "indicated [trial counsel] would be the

attorney moving forward." At that point, trial counsel asked the court "to start with a *Marsden* hearing" and the court held one.

During the in camera *Marsden* hearing, the court asked mother why she felt counsel had not adequately represented her and asked mother to provide "specific reasons." Mother stated, "I feel that way because there's new evidence [in] the case . . . and it has not been presented, and I feel that I should have a fair right to have the new evidence in this case presented." The court then asked mother whether there was "anything else that [counsel] hasn't done for you that you feel she should have done for you?" In response, mother stated she felt counsel should have filed a section 388 petition. The court asked, "Is there anything that she has done that she shouldn't have done" and mother stated, "I feel like there should be more communication and I should be able to get ahold of my attorney whenever [ ] I need to. . . . I call her office and don't receive calls for [ ] weeks after. . . . I just feel that I should be more updated and more paid attention to in my case."

Trial counsel summarized her experience and responded to mother's complaints. She described her representation of mother, noting "[t]here was some extra effort in this case" to prevent the removal of mother's other child from parental custody. Counsel also explained she had considered whether to file a section 388 petition on mother's behalf based on the mother's sobriety and on "how well she was doing in her voluntary family maintenance" with her son. Counsel stated she weighed trying to reach a settlement with daughter's prospective adoptive family with the filing of the section 388 petition and ultimately decided not to file the petition. In addition, trial counsel described her practice of returning client calls but admitted there had been a "breakdown in communication." Mother then stated she felt trial counsel could not adequately represent her "because of emotional feelings about me wanting new counsel."

The court denied the *Marsden* motion. It acknowledged mother's feelings but noted "the professional duty is for [counsel] to represent you to the best of her ability. [¶] The court finds no fault with [counsel's] representation. That doesn't mean you may like

it, and you're free to feel that you dislike it, but does it rise to the level where she needs to be replaced because of [your] feelings? It does not."

The court held the .26 hearing, where the parties stipulated the minor was adoptable. Daughter's social worker testified the prospective adoptive mother had accompanied daughter to visits with mother beginning in April or May 2012 and that since June 2012, daughter had been reluctant to leave her prospective adoptive mother during these visits. The social worker also testified daughter exhibited signs of distress when her prospective adoptive mother left the room during visits, but did not exhibit any distress when mother left the room. In June 2012, daughter referred to mother as "Mommy N.[ ]" and sometimes asked for her; by September 2012, however, daughter indicated she wanted to go home with her prospective adoptive mother after a visit with mother.

Mother testified she consistently visited daughter. She conceded, however, that daughter had "more of a comfort" with her prospective adoptive mother and that visits with daughter were not always easy for daughter. She claimed, however, that daughter ran to her, greeted her with open arms, and called her "Mommy" during a visit. Mother also testified daughter looks to her as a mother. Father testified mother was a good mother.

At the conclusion of the .26 hearing, the court commended both parents on "some very positive changes" but determined daughter was adoptable and that the beneficial parent-child relationship exception did not apply. The court terminated parental rights and ordered a plan of adoption.

## DISCUSSION

### I.

### *Mother and Father's ICWA Claims Fail*

Mother and father challenge the ICWA notices. Mother contends the notices were deficient because they omitted the maternal grandmother's last name. According to mother, the error was prejudicial because "the tribes did not have a meaningful opportunity to search the tribal registry." Father argues the notices failed to include

"readily available information" and that the Department failed to inquire about his "possible Indian ancestry." In his opening brief, he "makes the offer of proof . . . that he has California Indian ancestry" in a tribe that is not federally-recognized. Mother and father's claims are cognizable on appeal notwithstanding their failure to challenge the sufficiency of the ICWA notices in the juvenile court. (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267.)

In July 2011, mother completed Judicial Council form ICWA-020 (Parental Notification of Indian Status) indicating possible Cherokee and Choctaw heritage through "Kristina L[.] — MGM" and "Marsha S[.] — MGM." Father did not complete form ICWA-020. The Department completed the Notice of Child Custody Proceeding for Indian Child (Judicial Council form ICWA-030). Under "Mother's Biological Mother (Child's Maternal Grandmother)" the Department listed the maternal grandmother, Kristina, by her maiden name and her previous married name, not by her current married name. The form listed Kristina's names as "Kristina B[.] and Kristina D[.] (AKA)" and her date and place of birth.

The Department also listed the maternal great grandmother as "Marsha S[.] and Marsha St[.] (AKA)" and listed her date and place of birth. The form listed father's name and address under "Biological Father" and indicated "[n]o information available" under the section requesting information about "Tribe or band, and location." The Department mailed the form to the various tribes and to the BIA and sent a copy to mother and father. The United Band of Cherokee Indians in Oklahoma and the Eastern Band of Cherokee Indians responded that daughter was not registered, nor eligible to register, as a member of the respective tribes.

A. Any Error in Omitting Kristina's Current Married Last Name from the ICWA Notices Was Harmless

The purpose of ICWA is to "protect the interests of Indian children, and to promote the stability and security of Indian tribes and families. It sets forth the manner in which a tribe may obtain jurisdiction over proceedings involving the custody of an Indian child, and the manner in which a tribe may intervene in state court proceedings involving

child custody. When the dependency court has reason to believe a child is an Indian child within the meaning of [ICWA], notice on a prescribed form must be given to the proper tribe or to the Bureau of Indian Affairs. . . ." (*In re Elizabeth W.* (2004) 120 Cal.App.4th 900, 906.) "Notice is a key component of the congressional goal to protect and preserve Indian tribes and Indian families. Notice ensures the tribe will be afforded the opportunity to assert its rights under the Act irrespective of the position of the parents, Indian custodian or state agencies." (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1421.) California implements ICWA's notice requirements. (Cal. Rules of Court, rules 5.480-5.487.)

"The notice sent to the BIA and/or Indian tribes must contain enough information to be meaningful. [Citation.] The notice must include: if known, (1) the Indian child's name, birthplace, and birth date; (2) the name of the tribe in which the Indian child is enrolled or may be eligible for enrollment; (3) names and addresses of the child's parents, grandparents, great grandparents, and other identifying information; and (4) a copy of the dependency petition. [Citation.] . . . Notice to the tribe must include available information about the maternal and paternal grandparents and great-grandparents, including maiden, married and former names or aliases; birthdates; place of birth and death; current and former addresses; tribal enrollment numbers; and other identifying data. [Citation.]" (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703.)

"Deficiencies in an ICWA notice are generally prejudicial, but may be deemed harmless under some circumstances." (*In re Cheyanne F.* (2008) 164 Cal.App.4th 571, 577 (*Cheyanne F.*).) The only deficiency identified by mother is the omission of Kristina's current married last name — Kristina L[.] — on the ICWA notices. Under the circumstances, we conclude the omission of this information was harmless because there is no basis to believe that providing Kristina's current *married* name would have produced a different result concerning daughter's Indian heritage. (*Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 784 [omission of the mother's birth date was harmless because there was "no basis to believe" that providing the date "would have produced different results concerning the minors' Indian heritage"]; *In re I.W.* (2009) 180

Cal.App.4th 1517, 1531 [deficiencies in ICWA notice not prejudicial where the mother did not show "how the supposed deficiencies . . . would have made a difference given the information that was in the notices"].)

Here, the ICWA notices listed Kristina's maiden name and a previous married name and her date and place of birth. Tribes have made membership determinations with less information. (See *In re K.M.* (2009) 172 Cal.App.4th 115, 119.) We disagree with mother's contention that "the tribes did not have a meaningful opportunity to search the tribal registry" without Kristina's current married last name. In the event Kristina was registered with the tribe, the important information would likely have been her maiden name, which was included in the notices. Moreover, tribes know the information needed to make eligibility determinations. We presume that if the tribes needed additional information, they would have requested it or stated they lacked sufficient information to make a determination. (See *In re L.B.* (2003) 110 Cal.App.4th 1420, 1426.)

We are not persuaded by mother's reliance on *In re S.M.* (2004) 118 Cal.App.4th 1108 (*S.M.*) or *In re Louis S.* (2004) 117 Cal.App.4th 622 (*Louis S.*). In *S.M.*, the paternal grandmother and de facto parent told the social worker "there was 'Cherokee blood, on my mother's side.'" (*S.M., supra*, 118 Cal.App.4th at p. 1113.) The father also told "the social worker his grandmother, Lillian, may have been registered with one of the Cherokee tribes and before her death resided in . . . Texas." (*Ibid.*) The juvenile court determined ICWA did not apply even though a tribe twice requested additional information to verify heritage and the agency did not provide the information. (*Id.* at pp. 1114, 1117.)

The appellate court determined the notices were inadequate because "*no* information was provided in the ICWA notices about Lucille or Lillian, the person with alleged Indian heritage. . . . Because the notices contained no information about Lillian or Lucille, the tribes could not conduct a meaningful search with the information provided." (*S.M., supra,* 118 Cal.App.4th at p. 1116, italics added.) Here and in contrast to *S.M.*, the ICWA notices contained Kristina's maiden name, one of her married names, and her

birth date and place of birth. The notices also contained the maternal great grandmother's name, and place and date of birth. As a result, *S.M.* is distinguishable.

*Louis S.* is similarly inapposite. That case involved multiple problems with the ICWA notices, including misspellings of both the mother's and the daughter's names and the omission of the mother's grandmother's birth date. In addition, information about the family member alleged to have Indian heritage, was in the wrong place. (*Louis S.*, *supra*, 117 Cal.App.4th at p. 631.) Here, the only omission mother identifies is the omission of Kristina's current married last name.[3]

We conclude the omission of Kristina's current married last name from the ICWA notices was harmless. On the record before us, the ICWA notices contained sufficient information "to permit the tribe[s] to conduct a meaningful review of [their] records to determine [daughter's] eligibility for membership." (*Cheyanne F., supra,* 164 Cal.App.4th at p. 576; *In re Jonathan D.* (2001) 92 Cal.App.4th 105, 110 [technical compliance with ICWA "notice requirements may not be required where there has been substantial compliance"].)

B. Father Cannot Demonstrate Prejudice From the Department's Failure to Inquire About His "Possible Indian Ancestry"

Father argues the Department failed to inquire about his "possible Indian ancestry." In his opening brief — and for the first time in this case — he makes an offer of proof that "he has California Indian ancestry" in the "Gabrieleno (Mission San Gabriel) Tribe" (Gabrieleno Tribe), which he concedes is not federally-recognized. Citing an Internet website containing legislation introduced — but not enacted — during the 2001-2002 congressional session, father claims "[h]istorically, members [of the

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[3] Father claims the Department knew, but failed to include, Kristina and Marsha's addresses in the notices. For the reasons discussed above, we conclude any error in omitting this information was harmless where the notices contained the maternal grandmother and great grandmother's names, and dates and places of birth. Father has not argued how the inclusion of the current addresses for daughter's grandmothers on the ICWA notices would have produced a different result concerning daughter's Indian heritage.

Gabrieleno Tribe] relocated to the Tejon Indian reservation[,]" a federally-recognized tribe.[4]

Even if we assume for the sake of argument the notices were deficient and the court and the Department failed in their inquiry responsibilities, we conclude father has failed to show a miscarriage of justice from the asserted errors, "which is the fundamental requisite before an appellate court will reverse a trial court's judgment. [Citation.]" (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430 (*Rebecca R.*).) This is so because "ICWA applies only to federally recognized tribes[.]" (*K.P., supra,* 175 Cal.App.4th at p. 5; *In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1386 [ICWA "does not require an *inquiry*" where there is no indication a dependent child is Indian].)

Here, and as father concedes, ICWA does not apply to the Gabrieleno Tribe. As in *K.P.,* "[w]e decline to extend [ ] ICWA to cover an allegation of membership in a tribe not recognized by the federal government." (*K.P., supra,* 175 Cal.App.4th at p. 6.) Notwithstanding his offer of proof, there is no evidence father is a member of a federally-recognized tribe. As a result, he cannot demonstrate prejudice in the asserted errors. (*In re H.B.* (2008) 161 Cal.App.4th 115, 122 [no prejudice where mother never asserted

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[4] This information was not before the juvenile court and father has not requested we take judicial notice of it. (See *In re K.P.* (2009) 175 Cal.App.4th 1, 5 (*K.P.*) [declining to judicially notice "information appellants' counsel claims to have found on the Internet" apparently demonstrating the mother's tribe might be affiliated with a federally-recognized tribe where the evidence was not before the juvenile court and where appellants did not move for judicial notice in the appellate court].)

Father's reliance on *Louis S., supra,* 117 Cal.App.4th 622, is misplaced. In *Louis S.,* the maternal grandmother was alleged to be an Apache, and the minor was eligible for membership in the Chiricahua Tribe, a branch of the Apache. (*Id.* at p. 627.) Among the ICWA issues raised on appeal was whether the agency should have notified all eight federally recognized Apache tribes. (*Id.* at p. 632.) The Court of Appeal noted the Chiricahua Tribe was not federally recognized but the record established the tribe may have merged with one or more of the federally recognized Apache tribes. (*Ibid.*) The *Louis S.* court held the agency should notify the BIA and the federally recognized tribe or tribes that had absorbed the Chiricahua. (*Id.* at pp. 632-633.) Here and in contrast to *Louis S.*, the record contains no evidence the Gabrieleno Tribe is or has been absorbed by a federally recognized tribe.

Indian ancestry and denied such ancestry in statement to social worker]; *In re N.E.* (2008) 160 Cal.App.4th 766, 769.)

"The knowledge of any Indian connection is a matter wholly within the appealing parent's knowledge and disclosure is a matter entirely within the parent's present control. The ICWA is not a 'get out of jail free' card dealt to the parents of non-Indian children, allowing them to avoid a termination order by withholding secret knowledge, keeping an extra ace up their sleeves. Parents cannot spring the matter for the first time on appeal without at least showing their hands. Parents unable to reunify with their children have already caused the children serious harm; the rules do not permit them to cause additional unwarranted delay and hardship, without any showing whatsoever that the interests protected by the ICWA are implicated in any way." (*Rebecca R., supra*, 143 Cal.App.4th at p. 1431.)

II.

*The Court Did Not Abuse Its Discretion by Denying Mother's Marsden Motion*

Mother contends she did not receive a proper hearing on her *Marsden* motion and "was denied effective assistance of counsel when her counsel failed to file a section 388 modification petition on [her] behalf, failed to communicate with [her] about the case, and acknowledged that the conflict between them was so great as to prevent [her] from receiving an adequate defense."

"When a defendant seeks new counsel on the basis that his [or her] appointed counsel is providing inadequate representation—i.e., makes what is commonly called a *Marsden* motion [citation]—the trial court must permit the defendant to explain the basis of his [or her] contention and to relate specific instances of inadequate performance. A defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." (*People v. Smith* (2003) 30 Cal.4th 581, 604.)

Parents in a juvenile dependency proceeding may file a *Marsden* motion "'to air their complaints about appointed counsel and request new counsel be appointed.'" (*In re A.H.* (2013) 218 Cal.App.4th 337, 342, fn. 5, quoting § 317.5; see also *In re Z.N.* (2009) 181 Cal.App.4th 282, 289 (*Z.N.*).) An exhaustive *Marsden* hearing is not required in a dependency action. The juvenile court need only "make *some* inquiry into the nature of the complaints against the attorney." (*In re James S.* (1991) 227 Cal.App.3d 930, 935, fn. 13.) We review the court's denial of mother's *Marsden* motion for abuse of discretion. (*Z.N.*, *supra*, 181 Cal.App.4th at p. 294.)

First, we reject mother's claim that the court failed to conduct a sufficient inquiry into the nature of her complaints about trial counsel. The court complied with its duty to allow mother to state reasons for requesting a substitution of counsel. (*People v. Smith* (1993) 6 Cal.4th 684, 691; 5 Witkin, Cal. Criminal Law (4th ed. 2012) Criminal Trial, § 159, p. 275.) "'To the extent there was a credibility question between [mother] and counsel . . . the court was "entitled to accept counsel's explanation." [Citation.]'" (*People v. Jones* (2003) 29 Cal.4th 1229, 1245.) Moreover, the record clearly shows the court provided mother with "repeated opportunities to voice [her] concerns, and upon considering those concerns reasonably found them to be insufficient to warrant relieving trial counsel. We therefore find no basis for concluding that the [juvenile] court . . . failed to conduct a proper *Marsden* inquiry. . . ." (*People v. Hart* (1999) 20 Cal.4th 546, 604; *People v. Valdez* (2004) 32 Cal.4th 73, 95-96 [trial court conducted sufficient inquiry during *Marsden* hearings].)

Nor are we persuaded by mother's claim that the denial of her *Marsden* motion "substantially impaired" her right to assistance of counsel. According to mother, she "needed new counsel" because trial counsel "failed to file a modification petition, which was [her] last resort . . . before the court terminated her parental rights." A parent in a juvenile dependency proceeding is entitled to effective assistance of trial counsel. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1659 (*Kristin H.*).) To establish a denial of that right, the parent must show counsel's failure to act as a reasonably competent dependency attorney would, and that the error was prejudicial. (*In re Merrick V.* (2004)

122 Cal.App.4th 235, 254-255 (*Merrick V.*).) Additionally, the parent must show counsel's omissions involved a crucial issue and were not the result of reasonable tactical decisions. (*Id.* at p. 255; *In re Dennis H.* (2001) 88 Cal.App.4th 94, 98-99.)

Here, it was not reasonably probable the court would have granted a section 388 petition, had trial counsel filed one. (*Kristin H., supra,* 46 Cal.App.4th at pp. 1667-1668.) Counsel is not required to make futile motions or indulge in idle acts to appear competent. (*Merrick V., supra,* 1122 Cal.App.4th at p. 255.) To prevail on a section 388 petition, the moving party must establish a meaningful change of circumstances and that the requested change of court order is in the child's best interest. (§ 388.) Mother could not establish a change of court order would be in daughter's best interest. As described in more detail below, the record on appeal indicates mother and daughter did not share a strong relationship, let alone one strong enough to prevent the termination of parental rights. It is always possible that a strong relationship would have developed if more visitation had been offered, and it is always possible such a relationship would have been strong enough to prevent the termination of parental rights. But this speculation does not rise to the level of reasonable probability. Thus, there was no deficient performance on counsel's part regarding her decision not to file a modification petition.

Finally, the lack of communication between mother and trial counsel was not "so great that it resulted in a total lack of communication preventing an adequate defense." (*Z.N., supra,* 181 Cal.App.4th at p. 294.) Here, the communication may have been strained, but there was not a "total lack of communication" throughout the 15-month representation. The breakdown in communication appears to have occurred shortly before the .26 hearing, when counsel moved her office, but it did not prevent adequate representation. That counsel stated there had been a breakdown in communication does not alter our conclusion. (*Z.N., supra,* 181 Cal.App.4th at pp. 295-296.)

III.

*The Court Did Not Abuse Its Discretion by Concluding the Beneficial Parent-Child Relationship Exception Did Not Apply*

Mother contends the court erred by terminating her parental rights because the beneficial parent-child relationship exception set forth in section 366.26, subdivision (c)(1)(B)(i) applies. We disagree.

Under section 366.26, subdivision (c)(1), the court must terminate parental rights if it finds the child is likely to be adopted unless the parent establishes, by a preponderance of the evidence, that one of the statutory exceptions applies. (See also Cal. Rules of Court, rule 5.725(d)(2)(C)(i).) To establish the applicability of the beneficial relationship exception, mother must demonstrate she has "maintained regular visitation and contact with [daughter] and [daughter] would benefit from continuing the relationship" with mother. (§ 366.26, subd. (c)(1)(B)(i).) The issue here is whether mother can establish daughter would benefit from continuing the parental relationship. Mother cannot.

The standard of "review of an adoption exception incorporates both the substantial evidence and the abuse of discretion standards of review. [Citation.] . . . The second determination in the exception analysis is whether the existence of that relationship or other specified statutory circumstance constitutes 'a compelling reason for determining that termination would be detrimental to the child.' [Citation.] This '"quintessentially" discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption,' is appropriately reviewed under the deferential abuse of discretion standard. [Citation.]" (*In re K.P.* (2012) 203 Cal.App.4th 614, 621-622.)[5]

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[5] "For years California courts have diverged in their view about the applicable standard of review for an appellate challenge to a juvenile court ruling rejecting a claim that an adoption exception applies. Most courts have applied the substantial evidence standard of review to this determination" and other courts "concluded that it is properly reviewed for an abuse of discretion. [Citation.]" (*In re K.P.*, *supra*, 203 Cal.App.4th at

To determine whether the beneficial relationship exception applies, the juvenile court "balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The beneficial relationship exception is "difficult to make in the situation, such as the one here, where the parents have [not] . . . advanced beyond supervised visitation." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51 (*Casey D.*).) At least one court has commented that the beneficial relationship exception "may be the most unsuccessfully litigated issue in the history of law. . . . [I]t is almost always a loser." (*In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1255, fn. 5, disapproved on other grounds in *In re Zeth S.* (2003) 31 Cal.4th 396, 413-414.)

Notwithstanding this high burden, mother argues she established the applicability of the beneficial relationship exception because she was "one of the most important figures in [daughter's] life" and because she had a "strong and positive relationship" with daughter and "loves her dearly." We are not persuaded. To establish the beneficial relationship exception, mother was required to show "more than that the relationship [with daughter] is 'beneficial.'" (*Casey D., supra*, 70 Cal.App.4th at p. 52, fn. 4.) She needed to demonstrate the relationship promotes daughter's well-being "'to such a degree that it outweighs the well-being [she] would gain in a permanent home with new, adoptive parents.' [Citation.]" (*Ibid.*, quoting *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1342; see also *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 329 [parent must occupy more than a "pleasant place" in the child's life for the beneficial relationship

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p. 621, citing cases.) In 2010, the Sixth District "cogently expressed" a "composite standard of review" for both prongs of the beneficial relationship exception. (*Id.* at pp. 621-622, citing *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.) We focus on the court's conclusion with respect to the second prong, which we review for abuse of discretion. (*In re K.P., supra*, 203 Cal.App.4th at p. 622.)

exception to apply].) Mother failed to do so. There was simply no evidence it would be detrimental to daughter to sever her relationship with mother. (*In re Amber M.* (2002) 103 Cal.App.4th 681, 689; see also *Casey D., supra,* 70 Cal.App.4th at p. 52.) To the contrary, there was compelling evidence that mother's visits with daughter were detrimental to daughter because: (1) daughter had nightmares after visits with mother; (2) the Department described the visits as "stressful and problematic[;]" (3) mother conceded visits with daughter were not always easy; and (4) daughter expressed no distress when mother left the room during visits. Moreover, both the Department and State Adoptions opined termination of parental rights would not be detrimental to daughter.

We conclude the court did not abuse its discretion by determining the beneficial relationship exception did not apply. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418 [loss of "loving and frequent" contact with parent was insufficient to show detriment from termination of parental rights].)

## DISPOSITION

The juvenile court's order terminating mother and father's parental rights and ordering a permanent plan of adoption is affirmed.

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Jones, P.J.

We concur:

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Needham, J.

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Bruiniers, J.